

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

GUMECINDO SILVA	§	
v.	§	CIVIL ACTION NO. 6:08cv108
DIRECTOR, TDCJ-CID	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Petitioner Gumecindo Silva, proceeding *pro se*, filed this application for the writ of habeas corpus complaining of the legality of his conviction. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Silva complained of a conviction for aggravated assault - family violence which he received on November 20, 2007, in the 114th Judicial District Court of Smith County, Texas. He took a direct appeal, which was dismissed because he had waived his appellate rights in his guilty plea. Silva does not indicate that he sought discretionary review and says that he has not filed for habeas corpus relief in state court; the on-line records of the Texas Court of Criminal Appeals confirms that Silva did not seek discretionary review, nor has he filed a state habeas corpus petition which has been transmitted to or ruled upon by that court.

After review of the pleadings, the Magistrate Judge issued a Report on March 31, 2008, recommending that the petition be dismissed without prejudice for failure to exhaust state remedies, as required by 28 U.S.C. §2254(b) and (c). The Magistrate Judge also recommended that Silva be denied a certificate of appealability *sua sponte*. Silva received a copy of this Report on April 7, 2008, but filed no objections thereto; accordingly, he is barred from *de novo* review by the

district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has reviewed the pleadings in this case and the Report of the Magistrate Judge. Upon such review, the Court has determined that the Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled application for the writ of habeas corpus be and hereby is DISMISSED without prejudice. It is further

ORDERED that the Petitioner Gumecindo Silva is hereby DENIED a certificate of appealability *sua sponte*. The denial of the certificate of appealability shall not prevent Silva from exhausting his state remedies in any lawful manner, including but not limited to seeking habeas corpus relief from the trial court and the Texas Court of Criminal Appeals pursuant to Article 11.07 of the Texas Court of Criminal Procedure, nor shall it prevent him from refiling his habeas corpus petition in federal court in the event that he does not obtain relief from the courts of the State of Texas. Finally, it is

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

SIGNED this 12th day of May, 2008.


MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE